MYTEKSI SDN BHD & ORS v. SURUHANJAYA PERSAINGAN

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[JUDICIAL REVIEW NO: WA-25-594-12-2019]
9 MARCH 2020

CIVIL PROCEDURE: *Judicial review – Application for leave – Judicial review against proposed decision of Competition Commission ('CC') – CC imposed penalty on applicants for abusing dominant position by imposing restrictive clause – Whether proposed decision final decision – Whether proposed decision disposed of rights of parties – Whether applicants exhausted domestic appeal process – Whether proposed decision amenable to judicial review – Whether court ought to exercise discretion to grant application of leave – Whether there were exceptional circumstances warranting granting of leave application – Whether application for leave premature – Rules of Court 2012, O. 53 r. 2(4)*

COMPETITION LAW: *Proposed decision – Judicial review against proposed decision of Competition Commission ('CC') – CC imposed penalty on applicants for abusing dominant position by imposing restrictive clause – Whether proposed decision final decision – Whether applicants exhausted domestic appeal process – Whether proposed decision amenable to judicial review – Competition Act 2010, ss. 36(1), 39, 40, 51(1) & 58(2)*

WORDS & PHRASES: *'decision' – Courts of Judicature Act 1964 – Whether proposed decision under Competition Act 2010 final decision – Whether disposed of rights of parties*

The first and second applicants provided services commonly known as 'Grab Taxi' and 'Grab Food' and 'GrabCar', 'GrabExpress', 'GrabsAds', 'GrabShare' and 'Grab For Business', respectively. The third applicant was the shareholder of the first and second applicants. The second applicant had entered into an agreement with Uber Malaysia Sdn Bhd ('Uber') which stipulated that, *inter alia*, Uber would transfer all its local assets and business to the second applicant. Upon complaints received, the respondent (i) investigated and found that Grab had abused its dominant position by imposing a restrictive clause on its drivers which effectively prevented the drivers from promoting Grab's current and potential competitors in the e-hailing platforms and transit media advertising; and (ii) imposed a penalty of RM86,772,943 on each applicant, pursuant to s. 36(1) of the Competition Act 2010 ('CA') ('proposed decision'). The respondent then published the proposed decision in a news release ('news release'). The applicants filed written representations to the respondent and, at the same time, filed the present application for judicial review, seeking (i) orders for (a) *certiorari* to enter the proposed decision into the High Court to be quashed; (b) prohibition against the investigation under ss. 14, 15 and/or 18 the issuance of a further proposed decision under s. 36 of the CA in respect of

the same complaints investigated by the respondent which culminated in the issuance of the proposed decision; and (c) damages; and (ii) declarations that (a) the respondent's decision to impose a penalty retroactively prior to the determination of an infringement under s. 40(1) of the CA was *ultra vires* the CA and the Competition Commission Act 2010 ('CCA'); (b) the respondent was and is not empowered to publicise or communicate a proposed decision, the fact of any proposed decision and/or contents of the same or any part of it, in any manner and/or to any parties other as provided for under s. 36 of the CA; and (c) the news release was *ultra vires* the CA and the CCA and/or the Chief Executive Officer of the respondent had acted *ultra vires* the CA and the CCA in giving the interview or interviews that led to the publication of the news release. Objecting to the applicants' application, the respondent argued that (i) the application was premature as the proposed decision was not a final decision amenable to judicial review; (ii) the applicants had not exhausted the local remedy to appeal to the Commission Appeal Tribunal ('CAT'); and (iii) the applicants failed to make a full and frank disclosure that the applicants had filed written representations and a notice informing their intention to make oral representations in relation to the proposed decision.

Held (dismissing application):

(1) The word 'decision' in O. 53 r. 2(4) of the Rules of Court 2012 ('ROC') is not defined and, as such, the interpretation 'decision' in s. 3 of the Courts of Judicature Act 1964 ('CJA') is applicable. Section 3 of the CJA states that a 'decision' means judgment, sentence or order but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. Hence, a decision envisaged under O. 53 r. 2(4) of the ROC is a decision that disposes the rights of parties which is also a final decision. (paras 12 & 14)

(2) Section 36(1) of the CA provides that upon the completion of an investigation, the respondent would make a proposed decision and serve the proposed decision to the party that may be directly affected by the said decision. If the party wishes to make an oral representation, the Commission would convene a session for the oral representations before making any decision and written notice would be given to the relevant parties. The next step is for the Commission to conduct a hearing and decide whether there is a non-infringement of a prohibition under Part II pursuant to s. 39 or finding of an infringement pursuant to s. 40 of the CA. Any infringement under s. 39 or finding of an infringement under s. 40 is appealable to the CAT. Under s. 58(2) of the CA, the proposed decision under s. 36(1) would be subject to further process before the respondent decided whether there was a non-infringement or an infringement under ss. 39 and 40, respectively. (paras 16, 19-22 & 24)

(3) Based on the features of the CA, the proposed decision did not dispose of or alter the rights of parties. It is not a final decision as the final decision is when the Commission decides on whether there is an infringement or otherwise. The fact that there is no provision for appeal against the proposed decision only supported the contention that the proposed decision was not a final decision. The application for judicial review was premature, frivolous and vexatious. Furthermore, the intention of the Legislature in enacting s. 51(1) of the CA was clear in that any party aggrieved by the decision of the respondent must first exhaust the internal remedy before commencing the judicial review application. This, the applicants failed to do. (paras 25, 26, 30 & 36)

(4) As judicial review is the discretion of the court, the application for leave may be allowed in an exceptional circumstance. However, there was nothing exceptional to entitle the applicants to bypass the domestic appeal process prescribed by s. 51(1) of the CA. The proper avenue to challenge the respondent's final decision was by appealing to the CAT. Additionally, the applicants failed to disclose the material fact that they have filed written representations to the respondent. This material fact was pertinent as it supported the fact that the proposed decision was not final and subject to further process before a final decision of finding a non-infringement or an infringement under ss. 39 and 40 of the CA, respectively. (paras 37 & 40-42)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Council of Civil Service Unions & Ors v. Minister of Civil Service [1984] 3 All ER 935 ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2019] 7 CLJ 143 CA ***(refd)***

Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No.2 Sdn Bhd [2019] 4 CLJ 131 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Ketua Pengarah Kastam dan Eksais v. Coach Malaysia Sdn Bhd [2019] 4 CLJ 454 CA ***(refd)***

Lee Kok Wai & Anor v. Securities Commission Malaysia [2015] 4 CLJ 260 HC ***(refd)***

Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal [2014] 3 CLJ 733 CA ***(refd)***

President Hotel Sdn Bhd v. Datuk Bandar & Anor And Crest Trading Sdn Bhd (Intervener) [1995] 1 LNS 167 HC ***(refd)***

A *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC* ***(refd)***
Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 5 CLJ 153 CA ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

B **Legislation referred to:**
Competition Act 2010, ss. 14, 15, 18, 36(1), (2)(c), 37, 38(1), 39, 40(1), 51(1), 58(2)
Competition Commission Act 2010, s. 18(1)
Courts of Judicature Act 1964, s. 3
Rules of Court 2012, O. 53 rr. 2(4), 5

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For the respondent - Lim Chee Wee, Kwan Will Sen, Manshan Singh & Pakeeza Mohamad Junus; M/s Skrine

Reported by Najib Tamby

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JUDGMENT

Nordin Hassan J:

Introduction

E **[1]** The applicants filed an application for leave to commence judicial review application against a proposed decision by the respondent dated 23 September 2019 and seeking the following reliefs:

(i) an order for *certiorari* to enter the proposed decision into the High Court to be quashed forthwith;

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(ii) an order of prohibition against the investigation under s. 14 and/or 15 and/or 18, and/or the issuance of a further proposed decision under, s. 36 of the Competition Act 2010 ('CA') by MyCC in respect of the same complaints which were investigated by MyCC and which culminated in the issuance of the proposed decision;

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(iii) a declaration that MyCC's decision to impose a penalty retroactively prior to the determination of an infringement under s. 40(1), CA was *ultra vires* the CA and the Competition Commission Act 2010 ('CCA');

(iv) a declaration that MyCC was and is not empowered to publicise or
H otherwise communicate a proposed decision, the fact of any proposed decision made under s. 36, CA and/or the contents of the same or any part thereof, in any manner and/or to any parties other than as provided for under s. 36, CA;

(v) a declaration that:

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(a) The publication of the news release entitled "MyCC PROPOSES TO FINE GRAB RM86 MILLION FOR ABUSIVE PRACTICES" by MyCC on its website at the following web link https://

www.mycc.qov.my/sites/default/files/pdf/newsroom/Proposed%20Decision%20aqainst%20GRAB%20%28En g%29.pdf and/or at a press conference on 3 October 2019 was *ultra vires* the CA and CCA; and/or

(b) The chief executive officer of MyCC had acted *ultra vires* the CA and CCA in giving the interview or interviews that led to the publication of the article entitled "Grab has till December 31 to submit written representations to MYCC" in The Edge for the week of November 18 to November 24, 2019;

(vi) an order for damages to be assessed and paid by MyCC to the first and second applicants pursuant to O. 53 r. 5, of the Rules of Court 2012 ('ROC') in respect of the costs incurred by for the purposes of complying with the directives of MyCC as set out in para. 256(ii) of the proposed decision; and

(vii) an order for damages to be assessed and paid by MyCC to the applicants pursuant to O. 53 r. 5, ROC in respect of the unauthorised publications stated in para. 51.5, or any of them.

[2] The respondent had objected the leave application to commence the judicial review on the ground that the application is premature as the proposed decision is not a final decision amenable to judicial review.

[3] In addition, the respondent contended that the applicants have not exhausted the local remedy to appeal to the Commission Appeal Tribunal.

The Background Facts

[4] The brief background facts in the present application are as follows:

(i) The first applicant is a company incorporated under the Companies Act 1965 and provides services commonly knowns as 'Grab Taxi' and 'Grab Food'.

(ii) The second applicant is also a company incorporated under the Companies Act 1965 and provides services commonly known as 'GrabCar', 'GrabExpress', 'GrabAds', 'GrabShare' and 'Grab For Business'.

(iii) The third applicant is a company incorporated in Cayman Islands and the sole shareholder of the first applicant. It is also the majority shareholder of the second applicant.

(iv) On or about 25 March 2018, the second applicant entered into an agreement with Uber Malaysia Sdn Bhd ('Uber') which provides among others, Uber would transfer all its local assets and business to the second applicant.

(v) Thereafter, on 30 October 2018, upon complaints received, the respondent initiated an investigation on this matter including issuing notices requiring the first and/or second applicants to provide information and documents pursuant to s. 18(1) of the CCA. The respondent also has recorded statements from witnesses who are employees of the first and second applicants.

(vi) The respondent *inter alia* found the following, that 'Grab had abused its dominant position by imposing a restrictive clause on its drivers which effectively prevented the drivers from promoting Grab's current and potential competitors in the e-hailing platforms and transit media advertising'.

(vii) On 3 October 2019, the respondent issued the proposed decision to each applicant pursuant to sub-s. 36(1) of the CA.

(viii) In the proposed decision, the respondent proposes to impose a financial penalty of RM86,772,943.76 on the applicants, failing which the applicants would be subjected to a daily penalty of RM15,000 from the date of service of the proposed decision.

(ix) On 27 November 2019, the respondent received the applicants' notice of intention to make oral representations and on 30 December 2019 the respondent received the applicants' written representations pursuant to s. 36(2)(c) of the CA.

(x) On 30 December 2019, the applicants also filed this present judicial review application.

The Respondent's Submission In Opposing The Leave Application For Judicial Review

[5] The respondent opposed the leave application, in essence, on the following grounds:

(i) The applicants' judicial review application is premature as the proposed decision is not a final decision and the applicants had not exhausted the internal appeal process under CA.

(ii) The applicants had failed to make full and frank disclosure that applicants have filed a written representation and filed a notice informing their intention to make oral representation in relation to the proposed decision.

The Applications' Submission

[6] Conversely, the applicants submitted which can be summarised as follows:

(i) The proposed decision is a decision amenable to judicial review.

(ii) There is no alternative remedy as there is no provision for an appeal in relation to the proposed decision under sub-s. 36(1) of CA 2010.

(iii) The proposed decision is tainted with illegality and as such the applicants can commence the judicial review application without having to exhaust the internal remedy of appeal process.

Findings of This Court

[7] It is trite law that leave to commence judicial review may be granted if the applicant can show an arguable case and the application is not frivolous and vexatious.

[8] The Federal Court in the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 at p. 488 (CLJ); p. 303 (MLJ) states as follows:

> Without need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the **leave application is not thought of as frivolous**, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though i.e. unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged. (emphasis added)

[9] Reverting to the present leave application, the objection by the respondent is that the judicial review application is premature as the proposed decision dated 23 September 2019 is not a final decision amenable to judicial review and the applicants have failed to exhaust the internal remedy of appeal process.

Issue Whether The Proposed Decision Is Amenable To Judicial Review

[10] In regards to judicial review application, O. 53 r. 2(4) of the Rules of Court 2012 provides as follows:

> (4) Any person who is adversely affected by the **decision**, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application. (emphasis added)

[11] The Federal Court in *Ahli-Ahli Suruhanjaya Siasatan Mengenai Klip Video Yang Mengandungi lmej Seorang Yang Dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Perlantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805, applied the House of Lords decision of *Council of Civil Service Unions & Ors v. Minister of Civil Service* [1984] 3 All ER 935 that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision-maker or refusal by him to make a decision, and that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[12] The word 'decision' as stated in O. 53 r. 2(4) is not defined under the Rules of Court 2012 and as such the interpretation of the word 'decision' in s. 3 of the Courts of Judicature Act 1964 is applicable which states:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

[13] I find support of this view in a Federal Court case of *Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No. 2 Sdn Bhd* [2019] 4 CLJ 131, which states as follows:

> [43] The word "decision" is expressly stated in O. 56 r. 2 of the RC 2012 together with the words "Judgment" and "order". The definition of the word "decision" in O. 56 r. 2 is not provided in the RC 2012. Generally the powers of the Courts mentioned in the RC 2012 are conferred by the provisions provided in the CJA. Thus, in interpreting the word "decision" in O. 56 r. 2 of the RC 2012, resort must be had to the meaning given to the word "decision" in s. 3 of the CJA.

[14] Hence, a **decision** envisaged under O. 53 r. 2(4) is a decision that disposes of the rights of parties which is also a final decision.

[15] Reverting to the issue at hand, it is pertinent to examine the structures or features of the CA.

[16] Sub-section 36(1) provides that upon completion of an investigation, the respondent will make a proposed decision and serve the proposed decision to party that may be directly affected by the said decision. Section 36(1) states:

> (36)(1) lf, after the completion of the investigation, the Commission proposes to make a decision to the effect that one of the prohibitions under Part II has been or is being infringed, the Commission shall give written notice of its proposed decision to each enterprise that may be directly affected by the decision.

[17] Further, sub-s. 36(2) provides:

> (2) The notice shall:
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> (a) Set out the reasons for the Commission's proposed decision in sufficient detail to enable the enterprise to whom the notice is given to have a genuine and sufficient prospect of being able **to comment on the proposed decision on an informed basis**;
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> (b) Set out any penalties or remedial action that the Commission proposes to apply; and
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> (c) **Inform each enterprise** to whom the notice is given that the enterprise may, within such reasonable period as may be specified in the notice:

(i) **submit written representations to the Commission**; and

(ii) **indicate whether the enterprise wishes to make an oral representation before the Commission**.

(emphasis added)

[18] Here, any affected party is given the following opportunity:

(i) to comment on the proposed decision;

(ii) to submit written representation to the Commission;

(iii) to make an oral representation before the Commission.

[19] If the party wishes to make an oral representation, the Commission will convene a session for the oral representations before making any decision and written notice will be given to the relevant parties as provided under s. 37 of CA 2010 which states:

Oral representation

(37) If an enterprise informs the Commission, within the period specified in the notice given under Section 36 that the enterprise wishes to make an oral representation, the Commission shall, before taking any relevant decision:

(a) convene any session for the oral representation to be held at a date, time and place determined by the Commission; and

(b) give written notice of the date, time and place to:

(i) the enterprise concerned;

(ii) any person who had lodged a complaint with the Commission concerning the practice that was the subject of the Commission's investigation;

[20] The next step is the Commission to conduct a hearing as provided under s. 38(1) which states:

(38) (1) Notwithstanding Section 37, the Commission may at any time conduct a hearing for the purpose of determining whether an enterprise has infringed or is infringing any prohibition under Part II.

[21] Thereafter, the Commission will then decides whether there is non- infringement of a prohibition under Part II pursuant to s. 39 or finding of an infringement pursuant to s. 40 of the CA. The said provisions are as follows:

(i) Finding of non-infringement

39. Where the Commission has made a decision that there is no infringement of a prohibition under Part II, the Commission shall, without delay, give notice of the decision to any person who is affected by the decision stating the facts on which the Commission bases the decision and the Commission's reason for making the decision.

(ii) Finding of an infringement

40. (1) If the Commission determines that there is an infringement of a prohibition under Part II, the Commission:

(a) shall require that the infringement to be ceased immediately;

(b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;

(c) may impose a financial penalty; or

(d) may give any other direction as it deems appropriate.

(2) The Commission shall, within fourteen days of its making a decision under this Part, notify any person affected by the decision.

(3) The Commission shall prepare and publish reasons for each decision it makes under this section.

(4) A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

[22] Further, any decision of finding of non-infringement under s. 39 or finding of an infringement under s. 40 is appealable to the Competition Appeal Tribunal ('CAT') pursuant to s. 51(1) which provides:

51.(1) A person who is aggrieved or whose interest is affected by a decision of the Commission under section 35, 39 or 40 may appeal to the Competition Appeal Tribunal by filing a notice of appeal to the Competition Appeal Tribunal.

[23] The CAT may confirm or set aside the decision or make other order as provided in s. 58(2) which states:

(2) The Competition Appeal Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may:

(a) remit the matter to the Commission;

(b) impose or revoke, or vary the amount of, a financial penalty;

(c) give such direction, or take such other step as the Commission could itself have given or taken; or

(d) make any other decision which the Commission could itself have made.

[24] The provisions alluded to above show that the proposed decision under s. 36(1) will be subject to further process before the respondent decides whether there is a non-infringement or an infringement under ss. 39 or 40 respectively.

[25] Having examined the features of the CA, I find the proposed decision does not dispose of the rights of parties or alter such rights. It is not a final decision as the final decision is when the Commission decides on whether there is an infringement or otherwise.

[26] The fact that there is no provision for appeal against the proposed decision only supports the contention that the proposed decision is not a final decision.

[27] In the Court of Appeal case of *Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 5 CLJ 153 an appeal was dismissed as the decision is not a final decision where it was held as follows:

> [22] *Apart from the reason as prognosed above, this appeal could also be dismissed on the ground that the judicial review application by the appellant merely served to fragment the decision-making process and hence premature. We were not convinced that a 'decision' existed here that was amenable to judicial review in the context of judicial or administrative proceedings. The decision of the first respondent could not be said to have effectively disposed of the matter whereby its decision was final and determinative of the issue under consideration.*
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> [23] The High Court in *Australian Broadcasting Tribunal v. Bond & Ors* 94 ALR 11 when considering whether a decision was amenable to judicial review under the provisions of the Administrative Decisions (Judicial Review) Act 1977 had occasion to remark:
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> > … On the other hands the purposes … are to allow persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes. On the other hands, in so far as the ambit of the concept of 'decision' is extended, there is a greater risk that the efficient administration of government will be impaired. To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process. (emphasis added)

[28] Likewise in the present case, the proposed decision does not disposed of the matter or issue under consideration and not a final decision.

[29] On the same issue, the High Court in the case of *Lee Kok Wai & Anor v. Securities Commissions Malaysia* [2015] 4 CLJ 260 held as follows:

> [vi] in determining whether the decision was reviewable, the court would have to examine if the issuance of the notice to show cause was part of the AOB's duty to carry out the investigation or inquiry and/or whether there were ongoing proceedings before it. *Once there was determination and/or final determination of the issues arising from the enquiry, only at this point the applicants would be at liberty to apply for judicial review to quash her said decision*.
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> (emphasis added)

[30] On this ground alone, I find the application for judicial review is pre-mature and as such is frivolous and vexatious.

[31] In addition to this, even if a decision has been made as to whether there is an infringement or otherwise under ss. 39 or 40 of the CA, which is none in the present case, the aggrieved party including the applicants have to exhaust the internal remedy of an appeal to the CAT. Again, the applicants should not commence the judicial review application before having exhausted the internal remedy.

[32] In the case of *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505; [2011] 2 MLJ 457, it stated:

> [16] The second question could better be described as a consequence of the first question. Section 71A has provided a *remedial mechanism within the framework of the trade union legislation, that is a specific procedure whereby an appeal lies to the Minister. The second question relates to another matter*, that is since s. 71A(1) is applicable to an employer does it still permit the employer to have an option not to appeal, and additionally instead have recourse to a court of law in order to challenge the registration. *The declaratory orders sought by the appellant would have the effect of negating the decision of the first respondent. By praying for the declaratory orders the appellant is in effect appealing against the decision of the first respondent while a specific procedure has been laid down in the Act 262. By statue a second tier has been established whereby an appeal lies to the Minister.* The word used in s. 71A(1) (b) is 'may'. In construing the word 'may' generally, it could be contended that the word is permissive in relation to the person who it given the right to appeal in the sense that is gives the person a choice to prefer an appeal against the decision of the registrar or not to. But, *in relation to the person who is to be affected by the appeal we do not see this as directory. The declaratory orders sought for seek to reverse the decision of the registrar. Hence in that sense if an employer wishes to refute recognition then it is the mandatory procedure that is laid down that has to be resorted to for the legislation has identified the specific procedure whereby any person who is dissatisfied is to seek further recourse with the Minister if that person wishes to negate the decision of the registrar.*
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> [17] *In our opinion the legislation by stipulating that the decision of the Minister is to be final is itself indicative that when there is already stipulated a second tier identified in the legislation, courts are not authorised to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words the statutory right has to be exhausted.* (emphasis added)

[33] In another decision by the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563, the same issue has been explained in the following words:

> [58] To dispel any fear of a taxpayer, merely because he has to face such an awesome body in the form of the *Sun Man Tobacco Co. government, Gill FJ in v. Government of Malaysia* [1973] 2 MLJ 163 had occasion to state:

> The doors of justice are not shut to him merely because its claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-Genera/acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

[34] Likewise, the Court of Appeal case of *Pengarah Kastam Negeri Johor & Anor v. Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal* [2014] 3 CLJ 733, where it stated as follows:

> [18] Having perused that provision, we would agree with learned SFC that such recourse could only be had after the respondent taxpayer had exhausted the available remedy as provided for by Parliament within the four corners of the Sales Tax Act 1972. That would necessarily mean that the respondent taxpayer must have exhausted its appeal remedy with the Director-General of Customs in respect of the impugned notice as envisaged under s. 68 of the Sales Tax Act 1972 (*supra*). While s. 141N seems to suggest that the aggrieved party go to the High Court, it does not expressly say that the aggrieved taxpayer may do so without first exhausting its remedy by appealing to the Director-General.

[35] Apart from the abovementioned cases, the Court of Appeal in *Ketua Pengarah Kastam dan Eksais v. Coach Malaysia Sdn Bhd* [2019] 4 CLJ 454; [2019] 2 MLJ 716, further explained this issue as follows:

> [34] We further agreed with the learned senior federal counsel that the appeal should be allowed on another ground, and that is the respondent's application for judicial review was premature as there was an alternative remedy available to it under s. 124 of the GST Act. The provision was couched in the following language:
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> 124. Application for review:
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> (1) Any person may apply to the Director General within thirty days from the date the person has been notified of any decision made by an officer of goods and services tax for the review of the decision and provided no appeal has been made on the same matter to the Tribunal or court.
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> (2) Where an application has been made under subsection (1), the Director General shall make a decision and notify the person within sixty days from the date of the application is received or within the time practicable.
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> (3) An application under subsection (1) shall be made in the prescribed manner and prescribed form.
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> [35] What the provision meant was that any person aggrieved by the decision of the DG may apply within thirty days of the notification of the decision, for a review of the decision, provided no appeal was made to the tribunal or to the court within that period.

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> [36] This was not done by the respondent. *In our view the intention of the Legislature then was clear, and that was for the person aggrieved by the decision of the DG to first exhaust the internal remedy before appealing to the tribunal or to the court.* (emphasis added)

[36] In the present case, the intention of the Legislature in enacting
B sub-s. 51(1) of CA was clear that any party aggrieved by the decision of the respondent must first exhaust the internal remedy before commencing the judicial review application. This the applicant failed to do.

[37] In any event, as judicial review is the discretion of the court, the application for leave to commence judicial review may be allowed in an
C exceptional circumstances as explained by the Supreme Court in *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185, which held:

> Held, allowing the appeal: (1) the discretion is still with the courts act by way of judicial review but where there is an appeal provision available to
D the applicant, *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

[38] Reverting to the present case, the applicants have failed to establish any exceptional circumstances as laid down in *Jagdis*'s case. Here, the
E respondent has complied with the provisions of CA in particular s. 36(1) before making the proposed decision.

[39] On this issue of exceptional circumstances, the Court of Appeal in *Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 7 CLJ 143; [2017] 6 MLJU 179, explained in the following words:

F

> [17] Exceptional means 'unusual; not typical': see *Concise Oxford English Dictionary* 11th Edition. **Very exceptional circumstances therefore mean very unusual circumstances**. What amounts to very unusual circumstances must depend on the factual matrix of each case.
>
> G [22] **There is nothing exceptional about the appellant's case to entitle it to by-pass the domestic appeal process prescribed by section 99 of the ITA**. Nor could we find 'very exceptional circumstances', in the sense that there was a clear Jack of jurisdiction, or a blatant failure to perform some statutory duty, or a serious breach of the principles of natural justice that the respondent can be said to the guilty of when he issued the Notices
H of Assessment.
>
> [23] The dispute was over the decision of the respondent to issue the Notices of Assessment for years of assessment 2008, 2009 and 2013, for which the appellant's remedy lies in appealing to the Special Commissioners in accordance with section 99 of the ITA. That would be
I the proper avenue for the appellant to challenge the decision of the respondent: *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563. (emphasis added)

[40] Likewise in the present case, there is nothing exceptional to entitle the applicants to by-pass the domestic appeal process prescribed by s. 51(1) of CA. The proper avenue to challenge the respondent's final decision is by appealing to the CAT.

[41] Additionally, the applicants in this case have failed to disclose the material facts that on 30 December 2019, the applicants have filed written representations to the respondent and filed notice informing the respondent of its intention to make oral representations pursuant to s. 36(2)(c) of the CA.

[42] This material fact is pertinent as it supports the fact that the proposed decision by the respondent is not final and subject to further process before a final decision of finding a non-infringement or an infringement under ss. 39 and 40 respectively.

[43] In the case of *President Hotel Sdn Bhd v. Datuk Bandar & Anor And Crest Trading Sdn Bhd (Intervener)* [1995] 1 LNS 167; [1995] 4 MLJ 517, leave granted was set aside and the court stated as follows:

> It is trite law that in judicial review cases, the applicant applying for leave owes a duty of full disclosure and *uberriamae fide* in that he is duty bound to make a full and candid disclosure of all material facts.

Conclusion

[44] Premised on the abovesaid reasons, the applicants' application for leave to commence judicial review is dismissed with cost of RM2,000 to be paid to the respondent.